Other relief

As regards the wife's claim for the creation of an investment trust fund of NZ$30,000 for the benefit of the children, I am not prepared to grant it. The husband has not been proven to be a man of such substantial means as may fairly be saddled with such a burden. Furthermore, maintenance has already been awarded to the children by consent. For the same reasons, there shall be no order of a lump sum settlement of NZ$160,000 against the husband as prayed.

I am also not prepared to accede to the suggestion made on behalf of the wife that the costs of valuations conducted by the valuer be solely paid by the husband. The wife did not independently adduce any evidence on the values of the landed property. The valuation reports were for the benefit of both parties. It is only fair that the costs involved be equally borne and paid by the parties as previously agreed.

Costs

As regards costs of the action, the wife fails in her claim for the creation of an investment fund and a lump sum payment. Although she subtantially succeeds in the claim on the division of assets, considerable time was wasted in the trial by reason of the submission on her behalf that was not supported by evidence. In all the circumstances and in the exercise of the discretion of the Court, I order that the husband pays $^1/_2$ of the costs of the action to the wife. In the absence of an agreement, such costs are to be taxed.

Conclusion

There shall be judgment that the petitioner/husband do pay the respondent/wife the sum of RM92,083 representing the latter's share of the matrimonial assets and do pay the respondent/wife $^1/_2$ of the costs of this suit. In the absence of an agreement, such costs are to be taxed.

KERAJAAN MALAYSIA

v.

GAN CHUAN LIAN @ GAN PUAY CHEE

HIGH COURT, MELAKA
DATO' HAJI ARIFIN BIN HAJI JAKA JC
[CIVIL SUIT NO. 21-13 OF 1991]
10 MARCH 1994

REVENUE LAW: Recovery of taxes - Application by Government for summary judgement - Whether defendant entitled to plead defence of set-off - Government Proceedings Act 1976, s. 42(2)(e) - Rules of the High Court 1980, O.18 r.17 & O.73 r.4(1).

This was an application by the plaintiff for summary judgement against the defendant for RM1,109,861.86 being cumulative tax due and unpaid on six notices of assessment issued to the latter for years of assessment 1976-1981. The defendant, while not challenging the quantum claimed, contended that he was entitled to a set-off of RM570,224.23 being surplus payment he had previously made in respect of years of assessment 1966-1973. The amount due for the years of assessment 1966-1973 was the subject matter of a seperate suit which was still pending at the time of the hearing of this case.

Issue: Whether in a proceeding by the Government for repayment of taxes the defence of set-off is available to the defendant.

Held:

[1] It is settled that in an application under O. 14 the Court may give leave to defend if the defendant can demonstrate that there is a triable issue by way of abatement or set-off. However by virtue of s. 42(2)(e) of the the Government Proceedings Act 1976 and by virtue further of the provision of O. 73 r. 4(1) of the Rules of the High Court 1980, the defence of set-off is not available in this case.

[Application for summary judgement allowed].

Cases referred to:

Government of Malaysia v. Abdul Rahman [1975] 1 MLJ 276 ***(refd)***

Chong Woo Yit v. Government of Malaysia [1989] 1 MLJ 473 ***(refd)***

Hanak v. Green [1958] 2 QB 9 ***(cit)***

Legislation referred to:
Government Proceedings Act 1976, s. 42(2)(e)
Income Tax Act 1976, ss. 103(4), (5A), 106(1), (3), 142(1), 145(2)(c)
Rules of the High Court 1980, O. 14, O. 18 r. 17, O. 73 r. 4(1)

Other sources referred to:
Halsbury's Laws of England, 4th Edn., Vol. 42, para 402, p. 239
Mallal's Rules of the High Court 1980 and Rules of the Supreme Court 1970, p. 94

For the plaintiff - Azlaily bt Abd. Rahman, FC
For the defendant - K.K. Chong (Halim bin Abdul Hamid with him); M/s. Koh Kim Leng & Co.

JUDGMENT

Haji Arifin Bin Haji Jaka JC:
This is an application by way of summons-in-chambers dated 8 April 1992 (Enclosure 8) by the plaintiff for summary judgment for the sum of RM1,109.861.86 under O.14 of the Rules of the High Court 1980.

It is not disputed by the defendant that he was served with six notices of assessment (additional) for the years of assessment 1976 to 1981 all dated 11 December 1977. The total amount of tax assessed for the said years of assessment was RM1,095,526.55 made up as follows:

Tarikh Taksiran	Tahun-tahun Taksiran	Jumlah Tuntutan
11.12.87	1976 (Tambahan)	RM141,058.30
11.12.87	1977 (Tambahan)	RM102,638.25
11.12.87	1978 (Tambahan)	RM 91,653.25
11.12.87	1979 (Tambahan)	RM157,017.90
11.12.87	1980 (Tambahan)	RM138,446.75
11.12.87	1981 (Tambahan)	RM464,712.10
	Jumlah	RM1,095,526.55

The defendant had paid only the sum of RM134,607.15 for the year of assessment 1976 within the time stipulated thus leaving a total balance of RM960,919.40. As the defendant failed to pay the said balance sum within 30 days after service of the notices of assessment penalties were imposed on the said balance sum by 10% under s. 103(4) and subsequently by 5% under s. 103(5A) of the Income Tax Act 1976 ('the Act') resulting in the sum due and payable to the plaintiff as a debt soaring to RM1,109,861.86 particulars of which are as in annexure 'A'.

The plaintiff filed the writ of summons and the statement of claim on 24 August 1991 against the defendant for the recovery of the said sum of RM1,109,861.86 as a debt due to the government under s. 106(1) of the Act. The defendant filed the Memorandum of Appearance on 10 September 1991 and filed his defence on 27 September 1991.

The grounds for the application were that the notices of assessment (additional) for years of assessment 1976 to 1981 were sent to the defendant at his last known address and the same were not returned undelivered (see paragraphs (ii) and (iii) affidavit of Lim Swee Eng - Enclosure 9) and as such the notices of assessment for the said years of assessment were deemed to have been served on the defendant under s. 145(2)(c) of the Act. A certificate under s. 142(1) of the Act was issued confirming the amount of tax outstanding and due from the defendant provides more than sufficient evidence for the Court to give judgment as claimed by the plaintiff. Furthermore it is contended by the plaintiff that there was no defence to the suit. (See para 7 in Affidavit of Lim Swee Eng - Enclosure 9).

The defence filed is a denial of the plaintiff's claim and part payment made within thirty days after the service of the notice of the assessment for year of assessment 1976 (tambahan) as stated in para 4 of the statement of claim was made under protest (see para 3 of the defence). It is crystal clear that the defence is no defence at all.

At the hearing of the application for summary judgment learned Counsel for the defendant conceded, and rightly so, that the defendant is not challenging the amount claimed by the plaintiff in view of what is clearly stated under s. 106(3) of the Act that in any proceedings under the section the Court shall not entertain any plea that the amount of tax sought to be recovered is excessive or incorrectly assessed or increased under s. 103(4) or (5A): see also *Government of Malaysia v. Abdul Rahman*

[1975] 1 MLJ 276 and *Chong Woo Yit v. Government of Malaysia* [1989] 1 MLJ 473. The learned Counsel for the defendant contended that the defendant is entitled to a set-off against the plaintiff's claim. This is the only issue raised by the defence. In support of this contention the learned Counsel pointed out that the defendant had made payments by installment (see para 4 and 5 of the affidavit by the defendant - Enclosure 18) and further submitted that there is a credit sum of RM570,224.23 in favour of the defendant for which the defendant is entitled to a set-off. The plaintiff confirmed the payments made by the defendant but explained that these payments were in respect of tax due from the defendant for years of assessment 1966 to 1973 (see affidavit of - Eng Soo Liang - para 4 - Enclosure 25). This amount due for the years of assessment 1966 to 1973 is the subject matter of a separate case i.e. Civil Suit No. 21-1-87 which is still pending.

After hearing the submissions of Counsel for the plaintiff and defendant and on careful scrutiny of the affidavits filed on behalf of the plaintiff and by the defendant I am more than convinced that even on the facts of this case itself there was no merit in the defendant's contention that he was entitled to a set-off.

It is settled that in an application under O. 14 the Court may give leave to defend if the defendant can demonstrate there is a triable issue by way of abatement or set-off. (See **Halsbury's Laws of England** 4th Edn., Vol. 42 - para 402 p. 239). The defence of set-off is provided for under O. 18 r. 17 of the Rules of the High Court 1980 which states:

> Where a claim by a defendant to a sum of money (whether of an ascertained amount or not) is relied on as a defence to the whole or part of a claim made by the plaintiff, it may be included in the defence and set off against the plaintiff's claim, whether or not it is also added as a counterclaim.

The learned Counsel for the defence made reference to O. 18 r. 17 and contended that the defence of set-off may be raised in respect of debt or damages, whether the amount is ascertained or not and whether it is also added as a counterclaim. Learned Counsel also refers to **Mallal's Rules of the High Court 1980** and **Rules of the Supreme Court 1970** p. 94 under the heading: **Set-Off.**

> The defence of set-off should entitle the defendant unconditional leave to defend. "If there is a set-off at all, each claim goes against the other and, either extinguishes it or reduces it." - per Sellers LJ in *Hanak v. Green* [1958] 2 QB 9.

I agree with the contention of the learned defence Counsel, in case where the proceeding is not instituted by the Government for payment of taxes, duties or penalties. In our present case the claim is made by the Government relating to repayment in respect of taxes.

With the very greatest respect I have to say that the learned Counsel has failed to consider s. 42(2)(e) of the Government Proceedings Act 1976 which provides:

> 2. Provision shall be made by rules of Court with respect of the following matters -
>
> (e) for providing
>
> (i) that a person shall not be entitled to avail himself of any set off or counterclaim in any proceedings by the Government for the recovery of taxes, duties or penalties, or to avail himself in proceedings of any other nature by the Government of any set off or counterclaim arising out of a right or claim to repayment in respect of any levies, duties or penalties.

In consequence of this it is provided under O. 73 r. 4(1) of the Rules of the High Court 1980 thus:

> Notwithstanding O. 15 r. 2, and O. 18 rr. 17 and 18, a person may not in any proceedings by the Government make any counterclaim or plead a set-off if the proceedings are for the recovery of, or the counterclaim or set-off arises out of a right or claim to repayment in respect of, any taxes, duties or penalties.

It is clear therefore that the defence of set-off is not available to the defendant in this case as it is a proceeding by the Government (plaintiff) for repayment of taxes and O. 73 r. 4(1) applies.

I am satisfied that in this case the defendant has failed to raise any triable issues and I therefore allow the plaintiff's claim in terms of the summons-in-chambers.

a

b

c

d

e

f

g

h

i